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In the
Supreme Court of the United States
OCTOBER TERM, 1973

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

DARRYL B. DEAKTOR,
Respondent

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner

vs.

AL PHILLIPS, JR., et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION

The Chicago Mercantile Exchange ("CME") respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on May 21, 1973, in *Deaktor* v. *Chicago Mercantile Exchange*, No. 71-1893, and *Phillips* v. *Chicago Mercantile Exchange*, No. 71-1892.

DECISION BELOW

The decision of the Court of Appeals has not yet been officially reported. The majority and concurring opinions are printed as Appendix A. A petition for rehearing en

banc was denied by order of June 26, 1973. A motion to recall and stay the mandate was denied by order of July 11, 1973.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

ISSUE PRESENTED

Whether the Seventh Circuit's decision conflicts with *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) ("Ricci"). This, in turn, involves two related questions:

(a) Does the *Ricci* decision preclude the Seventh Circuit's conclusion that the self-regulatory conduct of CME is "not arguably" protected by the Commodity Exchange Act.

(b) Did the Court of Appeals misconstrue *Ricci* by holding that the doctrine of primary jurisdiction did not apply to these complaints because plaintiffs alleged violation of a rule enacted by the CME, rather than attacking the rule itself.

STATEMENT OF THE CASE

The Chicago Mercantile Exchange ("CME") seeks reversal of the decision rendered by the Court of Appeals for the Seventh Circuit in these consolidated cases. That decision affirmed the trial court's refusal to apply the doctrine of primary jurisdiction expressed in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) *aff'g*, 447 F.2d 713 (7th Cir. 1971), and to refer the charges against CME to the Commodity Exchange Commission ("Commission") for initial consideration.

The allegations made against CME, as distinct from the defendant traders, may be summarized as follows:

Deaktor

After trading in July 1970 frozen pork belly futures had closed, CME instituted disciplinary proceedings against several members who had long positions in the market, charging them with having violated various rules of CME and with having manipulated July 1970 frozen pork belly futures prices. Hearings were conducted for six weeks before the full twelve-man CME Board of Governors, and severe penalties were imposed, including revocation of clearing house membership, suspensions from trading for up to three years, and substantial fines. Nevertheless, suit was filed by traders with short positions in the market charging that CME had failed to enforce its rules by not acting earlier to prevent a manipulation. The plaintiffs accuse CME of failing "to exercise reasonable care" in compliance with 7 U.S.C. §7a(8) and to act promptly to stop "the manipulative activities of the other defendants." (Complaint, ¶20).

Phillips

This case arises from an order by CME that certain clearing members liquidate fifty percent (50%) of their open interests *during* the March contract trading month to insure a free and competitive market. CME issued this order following a determination that the liquidity of March 1970 fresh eggs futures contracts was threatened. Thereafter, traders with long positions filed suit charging that CME (and some of its officers) violated the antitrust laws and the Commodity Exchange Act ("CEA") by this prompt move to prevent manipulation.

Thus, traders on the "wrong" side of the market seek to condemn the statutorily imposed self-regulation action of CME for taking action during the contract month in *Phillips* and for not taking action until contract trading ended

in *Deaktor*. The crucial issue raised by both complaints is whether CME adequately discharged its statutory duty of self-regulation.

The opinion below recited the following reasons given by this Court for its decision in *Ricci* that "the antitrust action should be stayed until the administrative officials have had opportunity to act":

> "(1) that it would be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action,' . . . ; (2) that some facets of the dispute between Ricci and the Exchange [were] within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promise[d] to be of material aid in resolving the immunity question." (Appendix 5a)

The Seventh Circuit further acknowledged that the issues in these cases depend upon whether the alleged action violated CME's rules and that this determination:

> "in turn involved issues of fact and questions concerning the scope and significance of the rules. These were matters which the [Supreme] Court thought could best be dealt with by those especially familiar with the customs and practices of the industry." (Appendix 6a)

But after setting forth the foregoing reasons why the doctrine of primary jurisdiction should apply, the Court of Appeals, in the instant cases, refused to follow the *Ricci* holding on the ground that because both complaints could be read to charge manipulation, "the conduct alleged in the present case is in no way arguably protected by the rules of the Chicago Mercantile Exchange or the Commodity Exchange Act," and that the exercise of primary jurisdiction was therefore unnecessary. (Appendix 11a).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE EXPRESS HOLDING IN RICCI v. CHICAGO MERCANTILE EXCHANGE, 409 U.S. 289 (1973)

The complaints in these cases attack the manner in which the CME discharged its duty of self-regulation under the Commodity Exchange Act to maintain freely competitive futures markets. This issue presents the clearest case for the exercise of primary jurisdiction under the rationale of *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973).

The Court of Appeals failed to draw the line between the self-regulation of CME in seeking to prevent action which might be manipulative and the trading activities of other defendants who are charged with the manipulations. We only contend that the primary jurisdiction of the Commission may be invoked in considering whether CME properly enforced its rules.

a. The Question Whether The Chicago Mercantile Exchange Fulfilled Its Statutory Duty Of Self-Regulation Or Failed To Enforce Its Rules Should Be First Considered By The Commodity Exchange Commission.

As this Court noted in *Ricci*, the crux of the commodity futures market regulatory system is the Congressional policy that imposes on designated contract markets, broad self-regulation responsibilities subject to agency control and judicial review. Futures trading in specified agricultural commodities may not legally occur except on gov-

ernment designated contract markets. In order to qualify as a contract market an exchange must adopt and file with the Secretary of Agriculture ("Secretary"), subject to his disapproval, rules of trading including rules to prevent manipulations and corners. The Commodity Exchange Act then requires the contract market to:

> "[E]nforce all • • • rules • • • which relate to terms and conditions in contracts of sale • • • or relate to other trading requirements and which have not been disapproved by the Secretary • • •." (7 U.S.C. §7a(8))

Failure of CME to enforce these rules, or failure to comply with any provision of the Commodity Exchange Act or regulations of the Secretary or Commission may result in (i) suspension or revocation of its designation as a contract market, or (ii) a cease and desist order, the violation of which may subject the contract market, its officers, and agents to fine and imprisonment. (7 U.S.C. §§7b, 13a). The Commodity Exchange Act and regulations issued thereunder, upon petition by individuals such as plaintiffs that CME failed to enforce or violated its rules, provide for disciplinary hearings by the Commission and judicial review. (7 U.S.C. §8(a), 17 C.F.R. §0.50-0.95).

The *Phillips* plaintiffs complain that CME, through its Business Conduct Committee during the March contract month, took action to prevent manipulation and cornering of the egg futures market by the longs (such as plaintiffs). This conduct was not only "arguably protected" by the Commodity Exchange Act, it was mandated by Section 7a(8). That statute requires CME to adopt rules and exercise self-regulatory powers to prevent manipulation. The Secretary and Commission supervise and control CME's self-regulatory functions on a day-to-day basis; they should review the issues raised in these cases before the federal courts entertain suit against CME.

With the advantage of hindsight (and a prosecution by CME itself), the *Deaktor* plaintiffs complain that CME took insufficient steps to discipline rather than to prevent in advance, a manipulation of the pork bellies market. A proper appraisal of this contention again requires administrative review to delineate CME's duty to initiate measures to remedy alleged manipulations and to determine the reasonableness, in the light of the technical nature of commodity futures markets, of CME's self-regulatory procedures. Under the guidelines of *Ricci*, the determination whether CME's self-regulatory measures were adequate or proper must first be made by the agency having immediate supervision of CME's duties in this respect. Conseseqently, the Seventh Circuit's decision should be reversed.

b. The Seventh Circuit Erred By Holding That The Self-Regulatory Action By CME Is Not "Arguably Protected" By The Commodity Exchange Act.

Accepting the cursory allegations by plaintiffs, and ignoring the denials of CME, the Court of Appeals indulged in the presumption that CME violated the Commodity Exchange Act or some of its own rules. Upon this premise, the Court of Appeals then reasoned that the CME's actions were not even arguably protected by the Commodity Exchange Act, and so the case was not controlled by *Ricci*.

The Seventh Circuit's attempt to distinguish *Ricci* rests upon a misconception of underlying facts. The Court of Appeals thought that these cases were "unlike *Ricci*" because:

> "The plaintiffs do not allege that any rule of the Chicago Mercantile Exchange is in violation of the antitrust laws or even the Commodity Exchange Act. They simply allege that past conduct by the Exchange and certain of its members, alleged to violate rules of the

> Exchange and the Commodity Exchange Act, caused them monetary injury for which they seek damages." (Appendix 7a)

But the cause of action in *Ricci* was also based upon alleged violations of CME's rules and the Commodity Exchange Act. As this Court summarized the complaint in *Ricci*:

> "Allegedly, this course of conduct violated both the rules of the Exchange and the Commodity Exchange Act and was pursuant to an unlawful conspiracy aimed at restraining the conduct of Ricci's business." 409 U.S. at 290-291

Moreover, the Seventh Circuit's approach begs the critical question. The factual dispute whether CME has violated any statute, regulation, or rule is precisely the type of issue that *Ricci* says should be referred to the Commodity Exchange Commission under the doctrine of primary jurisdiction. As stressed by Justice White, Congress has established a "specialized agency" to determine either that "a rule has been violated or that it has been followed." 409 U.S. at 307. The Seventh Circuit acknowledged but ignored the *Ricci* holding that prior Commission jurisdiction was "warranted in order to gain an agency ruling on whether the alleged Exchange action was in accord with Exchange rules." (Appendix 8a).

Whether traders in eggs (*Phillips*) and pork bellies (*Dealtor*) engaged in illegal manipulation has no relevance to the cause of action being asserted against CME. The Seventh Circuit's opinion fails to distinguish between the allegations of manipulation lodged against certain traders and the complaint made against CME of failing to enforce its rules. The concurrence falls into the same error by defining the "main issue common to all these

appeals" and "whether a manipulation of prices occurred." (Appendix 17a). With regard to CME, however, the crucial issue is whether it took appropriate action to regulate and prevent alleged manipulations and corners of the market. This issue is one that must be reserved to the administrative agency which has statutory authority to review and discipline such regulatory conduct by CME.

c. The Seventh Circuit Erred By Likening These Cases To A Private Fraud Action Under The Securities Laws.

Having viewed the complaints as simply alleging violations of CME rules, the Court of Appeals concluded that these cases could be treated just like any private damage suit for "violations of the securities acts." (Appendix 6a). The further fact that the Seventh Circuit viewed this case as a garden-variety dispute between traders again underscores its failure to appreciate the unique position of CME and the fact that special rules of primary jurisdiction have developed in suits brought against stock exchanges and commodities markets operating under a statutorily mandated duty of self-regulation. The Seventh Circuit's holding directly conflicts with *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), as that decision was construed and applied in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). This Court pointed out in *Silver:*

> "Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling * * * a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at 358, n. 12)

Thereafter, this Court held that actions against commodity futures markets fall within the category of situations that

Silver reserved for primary jurisdiction because the Commodity Exchange Act grants the Commission authority to review CME's enforcement of its rules. *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. at 302. The basis for this Court's decision in *Ricci* compels reversal of the holding below.

II.

THE SEVENTH CIRCUIT'S DECISION CREATES A SITUATION THAT WILL DISRUPT SELF-REGULATION OF THE COMMODITY FUTURES MARKETS.

Despite the heavy responsibility of congressionally imposed self-regulation upon contract markets, every action or decision of the contract market is susceptible to attack as being a concerted action to restrain trading. Such attacks cannot be permitted if the regulatory system is to work. Mr. Justice Stewart, dissenting in *Silver*, pointed to this danger facing a self-regulation system:

> "It may be assumed, I think that almost every exercise of an exchange's statutory duty of self-regulation would involve an actual or threatened concerted refusal to deal—a 'group boycott.'" (373 U.S. at 367, n. 1)

If the federal court entertains these cases without prior resort to the agency, precedent would be created for repeated imposition of complex and costly judicial proceedings against contract markets in every situation where self-regulatory action is taken or a decision made by contract markets, even though *bona fide* and within the sphere of their mandated duties. Indeed, the dilemma facing the CME in *Deaktor* and *Phillips* was stressed to this Court in the brief and oral argument when *Ricci* was decided.

A delicate balance must be struck to create a climate in which contract markets will be encouraged to bear the burdens and responsibilities of self-regulation, unstifled by the constant threat of harassing suits, and yet with ultimate responsibility to answer for their derelictions. This balance can be best evolved by the agency having the express regulatory authority to assure that the designated contract markets are properly enforcing their filed and operative rules.

Newly proposed regulations of the Commodity Exchange Authority underscore the significance of the dilemma facing CME. On July 10, 1973, the Administrator of the Commodity Exchange Authority published proposed requirements for contract markets to enforce statutory and regulatory requirements and to enforce their rules. 38 *Federal Register,* pp. 18469-18470. Section 1.51 of these proposed regulations provides, in part:

> "(a) Each contract market shall use due diligence in maintaining a continuing affirmative action program to secure compliance with all of the provisions of sections 5, 5a, 5b, 6(a) and 6b of the Act (7 U.S.C. 7, 7a, 7b, 8, 13a) and with all of the contract market's by-laws, rules, regulations and resolutions referred to therein. Such program shall include:
>
> • • •
>
> (7) A procedure which results in the taking of prompt, effective disciplinary action for any violation which is found to have been committed."

The Chicago Mercantile Exchange has thus been put in an intolerable position. It must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders. This situation will disrupt, if not immobilize, the self-regulatory machinery es-

tablished by the Commodity Exchange Act. The doctrine of primary jurisdiction expressed in *Ricci* was designed to alleviate this dilemma.

III.

THIS COURT MUST RESOLVE THE CONFUSION ARISING FROM THE CONFLICT WITHIN THE SEVENTH CIRCUIT BETWEEN THE DECISION BELOW AND THE EARLIER DECISION IN RICCI v. CHICAGO MERCANTILE EXCHANGE, 447 F.2d 713 (7th Cir. 1971).

On facts substantially identical to this case, a differently constituted Court of Appeals held in *Ricci* v. *Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir. 1971), that a complaint against CME for violation of its own rules and regulations should be stayed pending review by the "Commodity Exchange Commission and/or the Secretary of Agriculture" under the doctrine of primary jurisdiction. The Court of Appeals there stressed:

> "Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members." 447 F.2d at 719.

The instant panel of the Court of Appeals sought to distinguish *Ricci* on the ground that the particular conduct alleged to violate the antitrust laws in *Phillips* also was a violation of the Commodity Exchange Act and "there would therefore be no possible conflict between the antitrust laws and the Commodity Exchange Act." (Appendix 11a). This, of course, still begs the ultimate question: whether the conduct of CME in fact violated the Commodity Exchange Act. But even were the complaint viewed as not involving antitrust considerations, the dispute would then become one that involves only issues "con-

cerning the scope and significance of the rules," and that presents issues which are peculiarly within the area of administrative expertise. The lack of possible conflict between the antitrust laws and Commodity Exchange Act would thus remove an argument against primary jurisdiction.

The Seventh Circuit's decision has opened the door to unrestricted attacks upon CME's self-regulatory functions. Subsequent to the *Deaktor* and *Phillips* decision, the District Court refused to follow *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), in an antitrust suit attacking the CME's rules which set terms and conditions for trading in hams. *Mash* v. *Chicago Mercantile Exchange*, No. 71 C 2588 (N.D. Ill., July 24, 1973). The trader in *Mash* charged that CME violated the antitrust laws by the enactment and enforcement of a rule for delivery on futures contracts which specified an allowance for shrinkage of frozen hams of ¼ of 1% of the certified weights delivered. The challenged rule had been filed with the Secretary of Agriculture pursuant to Section 7a(8) of the Commodity Exchange Act, and not disapproved. On the basis of *Ricci*, CME moved for a stay of proceedings until after administrative consideration. The District Court denied CME's motion.

The decision below simply cannot be reconciled with the prior decisions in *Ricci*. The same rule of law should apply to all cases which challenge the self-regulatory functions of the CME. It is essential that this Court resolve the conflict in decisions.

CONCLUSION

For the reasons set out above, this Court should grant certiorari to secure adherence to its decisions in *Ricci* and to resolve the conflict between appellate decisions.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

Nos. 71-1890, 71-1892, 71-1893

DARRYL B. DRAKTOR,
Plaintiff-Appellee,
v.
L. D. SCHREIBER & Co., et al.,
Defendants-Appellants,
and
AL PHILLIPS, JR., et al.,
Plaintiffs-Appellees,
v.
THE CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1216
No. 70 C 2744
JOSEPH SAM PERRY, *Judge.*

ARGUED FEBRUARY 22, 1973 — DECIDED MAY 21, 1973

Before CASTLE, *Senior Circuit Judge,* PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These interlocutory appeals are from orders of the district court denying motions by defendant Chicago Mercantile Exchange and various

other defendants to stay action in the district court pending the exercise of primary jurisdiction by the Commodity Exchange Commission.

Darryl B. Deaktor, plaintiff in Nos. 71-1890 and 71-1893, brought a class action against the Chicago Mercantile Exchange and various members of the Exchange alleging that the defendant members manipulated and cornered the July, 1970 frozen pork bellies futures contracts market, forcing up the price of those contracts and injuring traders, such as the plaintiff, who sold short and had not liquidated their positions prior to the defendants' manipulation and thus were required to cover their positions by the purchase of contracts at inflated prices. This conduct was alleged to be in violation of 7 U.S.C. §1 *et seq.* of the Commodity Exchange Act. The Exchange was sued on the ground of failing to exercise reasonable care in compliance with 7 U.S.C. §7a(8), and thus failing to be aware of and to promptly halt the unlawful activities of the defendants. Various member defendants and the Chicago Mercantile Exchange moved for a stay of proceeding on the ground that plaintiff should first be required to seek relief from the Commodity Exchange Commission. The district judge denied these motions on August 23, 1971. On October 14, 1971, he certified this order for interlocutory appeal under 28 U.S.C. §1292(b).

The plaintiffs in No. 71-1892, Al Phillips, Jr., *et al.*, are twenty-four traders who sued the Chicago Mercantile Exchange, certain of its officers and members of its Business Conduct Committee, charging the defendants with monopolizing trading in March, 1970 fresh eggs, causing the price to fall and forcing sales at artificially depressed market prices. This conduct was alleged to violate the notice and hearing provisions in Rule 217(D) of the Rules of the Chicago Mercantile Exchange, 7 U.S.C. §§7a(8) and 13(b) of the Commodity Exchange Act, and sections 1 and 2 of the Sherman Act. Defendants' motion for a stay in proceedings was denied by the district court on September 17, 1971. This Court accepted interlocutory appeals in these cases and consolidated them.

The sole issue in these appeals is whether the district court could take jurisdiction of these actions or whether the Commodity Exchange Commission properly has primary jurisdiction over these proceedings. The defendants-appellants contend that the issue is decided, in their favor, by *Ricci* v. *Chicago Mercantile Exchange*, 41 U.S.L.W. 4097, 409 U.S. 289 (January 9, 1973). We have concluded that *Ricci* does not control these cases and that the district court was correct in refusing to stay proceedings to allow the exercise of primary jurisdiction by the Commodity Exchange Commission.

The Chicago Mercantile Exchange is a board of trade designated as a "contract market" by the Secretary of Agriculture pursuant to 7 U.S.C. §7. Designation as a contract market is required before trading in contract futures can be conducted. In order to qualify as a contract market, the Chicago Mercantile Exchange was required to file with the Secretary its rules, regulations and by-laws, including rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." 7 U.S.C. §7(d). It was required to

> "enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . . ." 7 U.S.C. §7a(8).

Pursuant to this requirement, the Chicago Mercantile Exchange Rule 217(C) provided that the Business Conduct Committee be charged with the duty and authority to prevent manipulation of prices and the cornering of any commodity. Rule 217(D) gives the Business Conduct Committee authority to investigate the transactions and financial condition of members, to examine their books, to prescribe capital requirements, and to issue cease and

desist orders, after notice and hearing, to members found to be engaging in conduct which is "unfair or unjust."

No specific private remedy for violations of these provisions is provided. The Act does make it a felony

> "for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, . . . or to corner or attempt to corner any such commodity, or knowingly to deliver . . . false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. §13(b).

Other provisions authorize the Secretary of Agriculture and the Commodity Exchange Commission to take preventive and remedial action. Thus, 7 U.S.C. §8 authorizes the Commission, after notice and hearing,

> "to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade is not enforcing or has not enforced its rules of government . . . or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Secretary of Agriculture or the Commission thereunder."

Provision is also made for the Commission to enter cease and desist orders against any contract market, director, officer, agent or employee who violates any provision of the Act or rules thereunder. Failure to obey the order is declared to be a misdemeanor. 7 U.S.C. §13a. The Secretary of Agriculture is authorized to disapprove any bylaw, rule, regulation or resolution issued or proposed by a contract market which relates to terms and conditions in contracts of sale if he finds that it will violate any of the provisions of the Act or rules thereunder. 7 U.S.C. §12a(7).

The Supreme Court considered this statutory scheme in the context of an antitrust suit alleging a conspiracy to restrain trade in the transfer of an Exchange membership in *Ricci* v. *Chicago Mercantile Exchange, supra.* The Court decided that in the circumstances there presented, the Commodity Exchange Commission should be given an opportunity to exercise jurisdiction prior to continuing the proceeding in the antitrust court. Although recognizing that the Commission could decide to refuse jurisdiction,[1] the majority of the *Ricci* Court felt that the combination of three factors present in that case outweighed this uncertainty. Those factors were (1) that it would be "essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action,' . . . ; (2) that some facets of the dispute between Ricci and the Exchange [were] within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promise[d] to be of material aid in resolving the immunity question." 41 U.S.L.W. at 4101.

Regarding the first factor, the Court noted that although repeal of the antitrust laws was not to be lightly assumed the Commodity Exchange Act clearly contemplated a membership organization and standards for the acquisition, retention and loss of membership. The Court reasoned that if the petitioner had lost his membership pursuant to a valid rule, the first question which the antitrust court would have to decide was whether the rule itself was immune from antitrust attack. But, the Court continued, if petitioner Ricci lost his membership in contravention of Exchange rules, "the antitrust action should very likely take its normal course, absent more compelling indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive." *Id.* at 4102.

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[1] 41 U.S.L.W. at 4102.

Looking at the second factor underlying its decision, the Court, while expressly declining finally to decide the jurisdictional question, noted that the Court of Appeals had found that the membership rules of the Exchange were related to "trading requirements" and "were thus among those rules which the Exchange could not ignore without violating the Act and bringing itself within the jurisdiction of the Commission" to remedy any violation of the statute and underlying rules. *Id.*

The Court also decided that a prior determination by the Commodity Exchange Commission would be of material aid in resolving the immunity question because the issue turned in the first instance on whether the loss of Ricci's membership violated the Exchange rules, which in turn involved issues of fact and questions concerning the scope and significance of the rules. These were matters which the Court thought could best be dealt with by those especially familiar with the customs and practices of the industry. The Court concluded that with the aid of administrative action, if the conduct alleged was in accord with a valid rule, "the antitrust court will be in position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits." *Id.* at 4103.

It can readily be seen that, except for the antitrust claim in No. 71-1892, these cases are unlike *Ricci* in one significant respect, in that the district court is not being asked to reconcile the possibly conflicting policies of two congressional acts. Rather, insofar as these actions are founded on alleged violations of the Commodity Exchange Act itself, the district court is simply being asked to do what it has traditionally been called upon to do in cases involving alleged violations of the securities acts, that is, to award monetary compensation to remedy the harm done by unlawful conduct. Therefore, if a private action exists under the Commodity Exchange Act, no reason appears why the discretionary jurisdiction of the Commission should be invoked prior to judicial proceedings,

any more than the jurisdiction of any other agency need generally be invoked before commencing a private damage action. The plaintiffs do not allege that any rule of the Chicago Mercantile Exchange is in violation of the antitrust laws or even the Commodity Exchange Act. They simply allege that past conduct by the Exchange and certain of its members, alleged to violate rules of the Exchange and the Commodity Exchange Act, caused them monetary injury for which they seek damages.

It is argued, however, that although no conflicting policies between two acts are here involved, primary jurisdiction should nevertheless be held to rest in the Commodity Exchange Commission on account of the difficult questions involved, which may require expertise beyond that of the average judge or juror, and because of possible conflicts in the law resulting from the opinions of different judges. The latter point may be answered by noting that the personnel, policies and views of administrative agencies and commissions do not remain forever constant. Conflicts arise in agency interpretations of law as well as within the courts. Furthermore, there is no reason to believe that more conflicts will result from judicial intervention in this area than in any other more traditional sphere of judicial activity. Finally, inasmuch as affording the Commission primary jurisdiction would not mean exclusive and final jurisdiction, there is no reason to conclude that whatever conflicts in the law may arise would be avoided by prior Commission action.

The argument that the Commission's expertise is needed and that judges and jurors would be unable to understand the issues involved may be answered in two ways.[9]

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[9] Appellants cite *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952), in which the Supreme Court stated, in deciding that the Federal Maritime Board should be given primary jurisdiction in an antitrust case, that "in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."

First, deference to an administrative commission solely on the basis that lay persons will be unable to understand the proceedings had been shown by experience to be unwarranted. Judges and juries regularly decide patent cases, antitrust claims and complicated securities cases. There is no reason to believe that they would have more difficulty with factual issues involving the purchase and sale of commodities. If issues do become too complex for the average juror, special instructions or the aid of a special master can be utilized. Secondly, the issue is not primarily whether an agency has special expertise as such, but "whether some parts of the case are within the exclusive jurisdiction of the agency." 3 Davis, Administrative Law §19.07 at 39 (1958). The Supreme Court in *Ricci* found prior Commission jurisdiction warranted in order to gain an agency ruling on whether the alleged Exchange action was in accord with Exchange rules. It stated, however, that should the Commission find that the Exchange action violated these rules, its jurisdiction would end, and "the antitrust action should very likely take its normal course, *absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive.*" 41 U.S.L.W. at 4102 (emphasis added). Inasmuch as the defendants in the cause of action under consideration here are alleged to have violated valid rules, and the Supreme Court has strongly indicated that the Commodity Exchange Commission's jurisdiction is limited and non-exclusive, we see no reason to require the plaintiffs to invoke the discretionary jurisdiction of the Commission.

There remains the question whether private damage actions are allowable under the Commodity Exchange Act. As noted earlier, no express provision is contained in the Act. The courts which have considered the question, however, have apparently uniformly concluded that such an action exists. *E.g., Booth* v. *Peavey Co. Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.

N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *United Egg Producers* v. *Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); 1 Bromberg, Securities Law: §4.6 (353) (1971). The rationale was stated in *Goodman*, *supra*, 265 F. Supp. at 447:

> "Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286."

The purpose of the Commodity Exchange Act has been stated to be "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 Geo. Wash. L. Rev. 215, 223 (1958). It is a felony under 7 U.S.C. §13(b) of the Act to manipulate or attemt to manipulate the price of any commodity or to corner or attempt to corner any such commodity. We think the enactment is at least in part intended to protect the interests of the plaintiff-traders in these actions. We therefore hold that a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions and that the district court was correct in permitting the plaintiffs to maintain their actions under the Commodity Exchange Act.

The issue of the antitrust allegation in *Phillips* v. *Chicago Mercantile Exchange* is somewhat more complicated. The Supreme Court in *Ricci* v. *Chicago Mercantile Exchange*, *supra*, did hold that an antitrust action in the dis-

trict court should properly be stayed in order to allow the Commodity Exchange Commission to rule on the question whether the Chicago Mercantile Exchange actions were in accord with valid rules promulgated under the Commodity Exchange Act. We think, however, that the difference in approach to that case by the Court of Appeals and the Supreme Court emphasizes how the present case differs significantly from *Ricci* and that the scope of the doctrine of primary jurisdiction as applied to the Commodity Exchange Act by the Supreme Court in that case does not include the present alleged conduct. The Court of Appeals in *Ricci* found that the facts alleged by the plaintiff in support of his antitrust charge would constitute violations of the Commodity Exchange Act and thus could be examined by the Commodity Exchange Commission, stating that the maintenance of a private treble-damage suit in those circumstances would present a problem of coextensive coverage under two acts which might be repugnant to the policy of the Commodity Exchange Act. 447 F.2d 713 (7th Cir. 1971). The Supreme Court, in contrast, held that if the Commodity Exchange Commission found a violation of valid rules, that should end its inquiry and the antitrust action should proceed in the absence of greater evidence that the Commodity Exchange Action remedies were to be exclusive.

This difference in the approaches of the two Courts indicates that our inquiry must focus on the particular conduct alleged to violate the antitrust laws and must consider whether it is arguably protected by the Commodity Exchange Act. In *Ricci*, the conduct was the transfer of a membership in the Chicago Mercantile Exchange without the permission of or even notice to the owner. Although in the absence of the Commodity Exchange Act such conduct appeared to be a clear violation of the antitrust laws, the Supreme Court held that the possibility that the Commodity Exchange Act limited the applicability of the antitrust laws in that case was "substantial." The reason for this was that Congress had declared that to deal in commodity futures at all one was required to be or deal

through a member of a designated board of trade. "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer and loss of membership." 41 U.S.L.W. at 4102. The Court noted that the Chicago Mercantile Exchange had promulgated such rules and was under the statutory duty to enforce them to the extent they were related to trading requirements. 7 U.S.C. §7a(8). In contrast, the conduct alleged in the present case is in no way arguably protected by the rules of the Chicago Mercantile Exchange or the Commodity Exchange Act. In fact, the Act expressly prohibits manipulation of commodity prices and the cornering of any commodity. There would therefore be no possible conflict between the antitrust laws and the Commodity Exchange Act unless the Commodity Exchange Act were deemed to be the exclusive means of remedying violations of the two acts. The Supreme Court, in *Ricci*, however, decided that question adversely to the petitioners.

We see no further argument for staying the actions in the district court. The orders appealed from are therefore affirmed.

AFFIRMED.

CASTLE, *Senior Circuit Judge*, concurring. The issue on this appeal is whether the district court abused its discretion in refusing to defer the issues raised by the various complaints to the primary jurisdiction of the Secretary of Agriculture or the Commodities Exchange Commission. I find no abuse of discretion, but I believe that the resolution of this issue is more difficult than the majority opinion indicates.

My understanding of the majority opinion is that deference is not warranted when the plaintiff alleges only that the defendants have violated provisions of the Commodities Exchange Act (the Act) or regulations whose validity he does not challenge. Respectfully, I believe that this approach is too mechanical for guidance beyond these

cases,[1] and perhaps not sufficiently appreciative of the problems raised by *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 93 S. Ct. 573 (1973). For the appellants have argued that the question of whether they have violated the Act and/or valid exchange regulations is precisely one for administrative determination. Since all three cases are intricately related to the issue of market manipulation, appellants urge that the determinations of relevant market conditions, the existence of price fluctuations, and the advisability and legality of their activity require the exercise of administrative expertise. Only after deferring to the administrative expertise of the Secretary or the Commission, appellants contend, can a court adequately determine whether there has indeed been a violation of the Act or the regulations promulgated pursuant to it.

Appellants' argument certainly finds support in past cases which have commanded deference in order to allow administrative agencies to make preliminary comprehensive investigations and analyses of the facts involved and to apply them to a statutory scheme. *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Trans-atlantic*, 400 U.S. 62, 68 (1970), *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), *United States* v.

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[1] There is support for the view that deference to administrative primary jurisdiction is not necessary when the only issues are whether a party has violated a valid statute or regulation and whether his activity is consequently clearly unlawful. *Carnation Co.* v. *Pacific Conference*, 383 U.S. 213, 222 (1966), *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 131-32 (1915), *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 668 (8th Cir. 1962). As was noted in *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868, 874 (6th Cir. 1968): ". . . it does not require administrative expertise to determine whether plaintiff violated rules and regulations and whether, because of such violation, defendants had the right to and did exclude plaintiff. . . ."

Western Pacific Ry., 352 U.S. 59, 64 (1956). The same rationale has been applied to the Commodities Exchange Commission's fact-finding function in *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. ....., 93 S. Ct. 573 (1973), where the court required deference to the administrative judgment of the Commodities Exchange Commission. In that case plaintiff Ricci, like the plaintiffs-appellees in the instant cases, alleged only that the Act and exchange rules had been violated. ..... U.S. at ....., 93 S.Ct. at 574. Despite the uncertainty of whether Ricci could obtain administrative adjudication of his complaint, the Court held that the Commission must make the first determination of whether valid regulations had been violated:

> That issue [of whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules] in turn appears to pose issues of fact, and questions about the scope, meaning and significance of exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and the unique marketplace involved in this case. They are matters typically lying at the heart of an administrative agency's task and here they appear to be matters which Congress has placed within the jurisdiction of the Commodities Exchange Commission.

..... U.S. at ....., 93 S. Ct. at 582 (footnote and citations omitted). Appellants have argued that this language mandates deference of the issues in these cases to the Commission also.[3]

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[3] A statutory argument supporting deference can also be made. The Commodities Exchange Act currently contains three means of punishing price manipulation and other violations: suspension of a commodities exchange or member from trading (7 U.S.C. §§ 8 and 9), the issuance of cease and desist orders (§§ 13a and 13b), and the imposition of criminal penalties (§ 13; but see also § 13c(b)). Each statutory penalty requires some determination by

In *Ricci*, however, the trial judge had no occasion to pass upon the question of whether the issues involved required deference to the Commission. But both the Court of Appeals and Supreme Court opinions recognized that the very nature of the Commodities Act required that each exchange have a membership organization and criteria for the acquisition, transfer, and loss of membership. ..... U.S. at ....., 93 S. Ct. at 581. Even though the factual issues of the case were quite simple and could have been easily disposed of in a civil proceeding,[3] *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 238-39 (1971), these opinions recognized that the Commission could articulate the ways in which an exchange could validly exercise its inherent power over

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[2] (Continued)
the Secretary that a violation of the Act has been committed before court action to enforce the penalty is allowed. Hearings are guaranteed before suspensions or the issuance of cease and desist orders; and the Secretary can refuse to refer any suspected violation for criminal prosecution if criminal sanctions would not be in the public interest. Here, however, plaintiffs are trying to impose a fourth penalty—monetary damages—which will not be subject to prior determination by the Secretary that a violation has occurred or that the imposition of a penalty would serve the public interest.

[3] Some of the factual issues which the Court identified for deference to the Commission were the questions whether Ricci's membership had been transferred to another before Ricci had revoked a transfer authorization; whether the transfer authorization was valid; whether the party who ordered the transfer had the power to do so; and whether the party ordering the transfer was indebted to Ricci. All these issues appear to be simple questions of fact. ..... U.S. at ..... n.15, 93 S. Ct. at 582 n.15.

membership,[4] and that this articulation would hopefully dispose of a preliminary issue in the task of reconciling the antitrust laws with the Commodities Exchange Act. Since the Exchange Act does not in any way give a commodities exchange or the Commission power to sanction price manipulation, and since, for reasons to be discussed below, deference to administrative expertise is not vital for defining the scope of the regulations governing the issues raised by the complaints, I do not believe that *Ricci* compels deference to administrative primary jurisdiction in these cases.

Courts have usually invoked the doctrine of primary jurisdiction where they have determined that the issues raised are within the unique expertise of administrative agencies, where the issues involve administrative discretion, and where the desire for uniformity would be frustrated by many courts reaching inconsistent decisions. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). Accordingly, a trial court asked to defer action on a matter arguably within administrative jurisdiction should consider these factors and examine the particular issues raised by the pleadings, the contribution that an administrative adjudication can make, and the effect that deferring the litigation will have upon the litigants involved. *Ricci* v. *Chicago Mercantile Exchange*, ... U.S. at ....., 93 S. Ct. at 584 (Marshall, J., dissenting).

The complaint in *Deaktor* v. *L. D. Schreiber & Co., et al.*, a class action on behalf of all traders allegedly harmed because of artificially inflated prices, alleges that the defendants exceeded daily trading limits, held or controlled

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[4] An examination of the exchange rules which the Court of Appeals found relevant indicates that they had little relevance to the factual questions involved. My suspicion is that the Court believed deference would allow the Commission to determine whether any unwritten rules sanctioned or prohibited the membership transfer. ..... U.S. at ..... n.11, 93 S. Ct. at 579 n.11.

net "long" positions in excess of position limits, and were responsible for manipulation of the prices of pork belly futures for July, 1970. The complaint further alleges that the Chicago Mercantile Exchange was or should have been aware of the manipulative activities and that it failed to act promptly to halt these violations of Exchange rules. All defendants' answers denied these allegations. From the complaints and arguments on appeal, it appears that the essential issues which must be adjudicated are whether the Commission had set quantitative limits for trading pork belly futures, whether the defendants exceeded these limits, whether the defendants' conduct caused unreasonable price fluctuations, and whether the exchange knew or should have known about the conduct of the defendants and should have acted to stop it. I do not think that the district court abused its discretion in determining that these issues do not require the application of administrative expertise, for they involve factual determinations within the traditional competence of juries.

The complaint in *Phillips* v. *Chicago Mercantile Exchange*, a class action brought on behalf of all traders who lost money on fresh eggs futures contracts allegedly because of the defendants' conduct, alleges that defendants violated both the antitrust laws and the Commodities Exchange Act by artificially depressing the price of egg futures for their own advantage. The complaint alleges that the defendants, acting through the Business Conduct Committee of the Chicago Mercantile Exchange, ordered parties holding contracts to buy fresh eggs to liquidate 50% of these contracts without giving these parties a hearing and without giving the liquidation order proper dissemination. As a consequence, the price of eggs was driven downward to enable the defendants to purchase sufficient egg contracts to extricate themselves from the economically undesirable position they were in before their illegal activity. The complaint further alleges that the defendants' activity was in violation of rules of the Chicago exchange relating to hearings and emergency action, constituted manipulation and the circulation of

false information as prohibited by the Act, and was an illegal conspiracy in restraint of trade. The defendants have denied all these allegations. Thus, the key issues are whether the defendants had the conspiratorial purpose alleged, whether they acted in the way alleged, and whether the harmful effects flowed from their action. Once again, I do not believe that the trial judge abused his discretion in finding these issues within the competence of his court.[5]

Given the unobtrusive nature of the facts at issue in these cases, I doubt whether deference to the Commission would add substantially to their resolution. These facts do not involve a pervasive regulatory scheme, *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350 (1959), or matters within administrative discretion, *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294 (1922), but rather a unique set of facts concerning situations which may never be repeated. The main issue common to all these appeals—*i.e.*, whether a manipulation of prices occurred—is one which the judiciary has considered itself just as competent as the Commodities Exchange Commission to pass upon. Since the term manipulation" is undefined in the Act, courts of appeal have given it meaning in the cases taken on direct appeal from Commission determinations. *Volkart Brothers Inc.* v. *Freeman*, 311 F.2d 52, 58 (5th Cir. 1962), *General Foods Corp.* v. *Branman*, 170 F.2d 220, 223-24 (7th Cir. 1948). Although

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[5] It is also questionable whether the Commodities Exchange Commission could even take jurisdiction over the issues pertaining to whether the defendants violated the rules governing hearings and emergency action. Congress, in giving the Commission power to force exchanges to police violations of their own rules, plainly indicated that this power would not extend to the enforcement of rules and regulations "such as those governing the organization and government of the exchange. . . ." S. Rep. No. 947, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News 1673, 1681 (1968).

commentators have argued that the judicial interpretation of "manipulation" has varied from circuit to circuit, Congress has declined to substitute a statutory definition of that term for the sake of uniformity. Vogelson, *Tightened Regulation for Commodity Exchanges*, 55 A.B.A.J. 858, 860 (1969).[8] In short, it is doubtful that deference can add much to the work of a court and jury in resolving the issues concerning manipulation in the instant cases; nor does it appear that Congress regards uniformity as a compelling consideration.

Finally, the interest of the plaintiffs in these cases should be considered. Any deference to administrative primary jurisdiction and subsequent appeals from administrative decisions before a district court adjudication of their complaints will increase costs, delay redress of any wrongs, and act to deter litigation. I also perceive several knotty problems involved in allowing an administrative agency to decide issues which are at the heart of a judicial proceeding. Assuming for the moment that a tort action for interference with one's trade was cognizable at common law, plaintiffs are entitled to a trial of their actions by a jury in the district court. *See, Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), 5 Moore's Federal Practice ¶38.19 (2d Ed. 1971). I seriously question whether a prior administrative determination of matters at the heart of a lawsuit could subsequently bind a court, for then the administrative proceeding would amount to a deprivation of plaintiff's Seventh Amendment

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[8] It should be noted also that a court of appeals reviewing any administrative determinations under the Commodities Act can set them aside if they are unsupported by the weight of the evidence. 7 U.S.C. §§ 8, 9, 13a, and 13b. This standard of review has been likened to a *de novo* determination, with proper regard to the credibility determinations of the trier of fact. *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479 (7th Cir. 1953). Surely if Congress were interested in promoting uniformity under the Act, it would have provided for a more stringent standard of review.

rights. If the administrative adjudication were not binding, I doubt whether it could be brought to the attention of the jury in the subsequent court proceeding, for it may be inadmissible as infringing upon the province of the jury. Refusal to defer, of course, would avoid these problems.

I find that the trial judge did not abuse his discretion in refusing to defer to the Commission in these cases, given the facts at issue and the particular regulations involved. I concur in the result.